Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Canadian Airport Workers Union,

applicant/former certified bargaining agent,

and

International Association of Machinists and Aeropspace Workers,

certified bargaining agent,

and

Garda Security Screening Inc.,

employer.

Board File: 29195-C
Neutral Citation: 2012 CIRB **657**
September 27, 2012

The Board was composed of Ms. Elizabeth MacPherson, Chairperson, and Mr. William G. McMurray and Ms. Louise Feeteau, Vice-Chairpersons.

Counsel of Record

Mr. Michael A. Church, for the Canadian Airport Workers Union

Mr. Elichai Shaffir, for the International Association of Machinists and Aerospace Workers

Mr. Michel A. Brisebois, for Garda Security Screening Inc.

I–Background

[1] On March 14, 2012, following a representation vote, the Canada Industrial Relations Board (the Board) certified the International Association of Machinists and Aerospace Workers (the IAMAW) as bargaining agent for a unit of employees of Garda Security Screening Inc. (Garda or the employer) working at three airports in Toronto. Prior to this date, employees in this bargaining unit had been represented by the Canadian Airport Workers Union (CAWU) and were subject to a collective agreement between Garda and the CAWU.

[2] Pursuant to its collective agreement with Garda, the CAWU had filed a number of grievances on behalf of various employees, referred those grievances to arbitration and established hearing dates with various arbitrators. Following the change in bargaining agent, the IAMAW was provided with the CAWU's files regarding 46 of these grievances. The IAMAW and Garda subsequently reached an agreement to clear up this backlog by submitting all of the outstanding grievances to a single arbitrator. Accordingly, Garda contacted the various arbitrators retained by the CAWU and cancelled the arbitration hearings.

[3] By letter dated July 31, 2012, the CAWU requested that the Board order that the IAMAW is responsible for paying any cancellation fees and invoices submitted by the arbitrators. The CAWU's request raises two issues for the Board: the extent of the rights and obligations that the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*) imposes on a union that succeeds another as bargaining agent pursuant to a certification order issued by the Board; and the extent of the Board's authority to deal with questions related to those rights and obligations.

[4] Having carefully reviewed the written submissions of the parties, the Board is of the opinion that this matter can be dealt with on the basis of the written record, and therefore exercises its discretion under section 16.1 of the *Code* not to hold an oral hearing.

II–Positions of the Parties

A–The CAWU

[5] The CAWU argues that the IAMAW should be directed to pay the arbitrators' respective cancellation fees and invoices which resulted from the IAMAW's decision not to proceed to arbitration before the arbitrators agreed to by the CAWU.

[6] It contends that the Board has jurisdiction to issue such an order because the Board remains seized with respect to any issues arising from its orders. It argues that the effect of the Board's certification of the IAMAW was to place the IAMAW in the same position as the CAWU had been previously. The CAWU asserts that the IAMAW was substituted as a party to the collective agreement, and therefore steps into the shoes of the CAWU for all purposes at the moment of certification.

[7] The CAWU submits that the arbitrations in question were set up under the authority of the collective agreement and that any obligations in connection with these arbitrations must be borne by the party to the collective agreement at the time that any material decisions are made with respect to those arbitrations. It states that the IAMAW failed to cancel the arbitration hearing dates in a timely manner, thereby attracting the cancellation fees.

[8] The CAWU alleges that the reason the IAMAW is refusing to pay any part of the cancellation fees is simply out of spite against the CAWU. It suggests that it is historical precedent and accepted past practice among both counsel and trade unions in the labour relations community that, in a situation such as this, the trade union that inherited the collective agreement would also attend to any associated responsibilities, obligations and cancellation costs as the "spoils of victory".

B–The IAMAW

[9] The IAMAW argues that the Board lacks jurisdiction to issue the order requested by the CAWU. Although it agrees that a union which displaces another union as bargaining agent is substituted as

a party to any collective agreement affecting the employees in the bargaining unit, it suggests that this does not extend to requiring the new bargaining agent to assume the financial liabilities of the displaced union. It points out that a new bargaining agent is likewise not entitled to the assets of the displaced union.

[10] In the alternative, if the Board has jurisdiction to grant the order requested, the IAMAW submits that no order should be made. The IAMAW submits that the CAWU alone is responsible for its financial liabilities, including the cancellation fees for arbitration hearings that the CAWU scheduled. It suggests that the CAWU could have cancelled these hearings when it lost its status as bargaining agent for the bargaining unit. It suggests that the CAWU is asking the Board to order that the IAMAW assume the CAWU's liabilities without providing it with any of the CAWU's assets. It asks that the request be dismissed.

C–Garda

[11] The employer advised the Board that it had no submissions to file on the issue.

III–Analysis and Decision

A–Extent of the rights and obligations that the *Code* imposes on a union that succeeds another as bargaining agent pursuant to a certification order issued by the Board

[12] The legislative provision that sets out the effect of certification is section 36 of the *Code*, which reads as follows:

> 36. (1) Where a trade union is certified as the bargaining agent for a bargaining unit,
>
> (*a*) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit;
>
> (*b*) the certification of any trade union that was previously certified as the bargaining agent for any employees in the bargaining unit is deemed to be revoked to the extent that the certification relates to those employees;

(*c*) the trade union so certified is substituted as a party to any collective agreement that affects any employees in the bargaining unit, to the extent that the collective agreement relates to those employees, in the place of the bargaining agent named in the collective agreement or any successor thereto; and

(*d*) the trade union so certified is deemed to be the bargaining agent for the purposes of paragraph 50(*b*).

(2) Where, pursuant to paragraph (1)(*c*), a trade union is substituted as a party to a collective agreement, the trade union may, within three months after the date on which it is certified as the bargaining agent for a bargaining unit affected by the collective agreement, require the employer who is a party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement.

(3) Subsection (2) does not apply to a trade union certified as a result of an application made under section 24.1.

[13] The CAWU directed the Board's attention to a decision of the Canada Labour Relations Board (the CLRB), in which the rights of a new bargaining agent after certification were considered. In *Bell Canada*, (1981) 43 di 238; [1981] 2 Can LRBR 284; (CLRB no. 311) (*Bell*) the CLRB considered a referral from an arbitration board under section 158 (now section 65) of the *Code* on a policy issue. The arbitration board asked the CLRB to determine what rights and authority a newly certified bargaining agent, which has displaced an incumbent union, has during the period after the collective agreement has expired but before the right to strike or lockout has been acquired. In reaching its conclusion that the new bargaining agent was entitled to file a grievance during this time period, the CLRB made the following observations:

> By certification the CWC was substituted for the CUC as a party [to the expired collective agreement]. **It could therefore continue past arbitration or grievance proceedings and it could initiate new ones.** Employees do not lose the benefits of the agreement and access to arbitration because they choose to change bargaining agents. This continuity allows employees to change bargaining agents without loss of rights. It allows matters to continue while the new bargaining agent and employer get acquainted and commence collective bargaining.
>
> When there is change in bargaining agents during collective bargaining the effect at the bargaining table is substantial. The effect on the rights at the shop floor is intended to be minimal. An employee discharge or other matters may still be grieved in accordance with the expired collective agreement. **Matters pending before arbitration may proceed with the new bargaining agent substituted for the old.**
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> (page 252; emphasis added)

[14] The *Bell* case dealt with the rights that a replacement bargaining agent acquires with certification, but not the corresponding obligations, which are the issue in this case. There is no doubt that, by virtue of section 36(1) of the *Code*, the incoming trade union obtains exclusive

bargaining rights and the predecessor union loses its representation rights with respect to the employees in the bargaining unit. The incoming union is, by operation of law, substituted as a party to any collective agreement applicable to the employees in the bargaining unit.

[15] Section 36 of the *Code* was not drafted with the same level of detail as certain other sections of the *Code* that deal with various types of successorship situations. For example, section 43 of the *Code* sets out the consequences of a merger, amalgamation or change of jurisdiction of unions. Admittedly, this section relates to events involving union structure that take place on a consensual basis, which is not the case in a displacement application. Nevertheless, the law makes it clear that, after a merger, amalgamation or transfer of jurisdiction, the successor union is deemed to have acquired the rights, privileges **and duties** of its predecessor, whether under a collective agreement **or otherwise**.

[16] Similarly, in the case of a sale of business, section 44 of the *Code* is clear that the successor employer is not only bound by any collective agreements applicable to the employees working for that business, but it is also, by express statutory language, substituted as a party to any proceeding affecting those employees or their bargaining agent that is pending on the date of the sale.

[17] In the Board's view, even though it is not expressly itemized in section 36, the intent of the *Code* is that a union which succeeds another as bargaining agent for a particular bargaining unit not only "steps into the shoes" of its predecessor for matters relating to collective bargaining, but also for matters relating to the representation of employees covered by any collective agreement applicable to the bargaining unit. This includes responsibility for processing grievances arising under the collective agreement. This conclusion is suggested by section 37 of the *Code*, the duty of fair representation, which imposes an obligation on the bargaining agent not to act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement. At the moment a new certification is issued, the incumbent union loses its representational rights and the successful union concomitantly acquires those representational rights and the obligations that accompany them. This would include the

obligation to deal with any grievances that were in progress on the date of certification, as the employees in the bargaining unit have the right to hold their newly certified bargaining agent to account under section 37 of the *Code*.

[18] However, this does not mean that the new bargaining agent must deal with the grievances in accordance with the strategy established by its predecessor. The new bargaining agent is not only entitled, it is obliged to review each grievance and give it careful consideration in accordance with the principles set out in the Board's jurisprudence regarding the duty of fair representation. After conducting such a review, the incoming union may decide not to proceed with the grievance, to endeavour to settle it with the employer or to proceed to arbitration in accordance with any procedure to which it and the employer may agree. This may include the choice of a different arbitrator or arbitration process.

B- Extent of the Board's authority to deal with questions related to the rights and obligations assumed by a new bargaining agent

[19] There is no doubt that the Board has all the necessary authority to deal with any complaints filed by a bargaining unit member against the new bargaining agent pursuant to section 37 of the *Code*. The Board has, in the past, dealt with duty of fair representation complaints that involved allegations against both a former and successor bargaining agent. In the event that the Board determines that there has been a breach of the *Code*, liability may be apportioned, if the circumstances require, in accordance with the degree of responsibility for the breach that the Board determines each bargaining agent to bear. Thus, although the displaced union may lose its representational rights with respect to a particular bargaining unit, the Board can still hold it responsible for decisions it made, or failed to make, during the period when it was the certified bargaining agent, and can make appropriate orders against it to remedy any breach.

[20] In this case, there is no complaint before the Board. The CAWU asks that the Board order the IAMAW to pay the cancellation fees charged by arbitrators when the IAMAW and Garda decided, following the IAMAW's certification, to deal with the outstanding grievances in a manner different

from the strategy that the CAWU had decided to follow when it was the bargaining agent. As explained above, it is the Board's view that it was quite legitimate for the IAMAW to decide to deal with the outstanding grievances in a manner that is different from the CAWU's approach.

[21] In the Board's view, the issue raised by the CAWU is a matter of contract law, and does not fall within the purview of the Board's authority under the *Code*. While the IAMAW and Garda were entitled to cancel the arbitration hearings (and indeed, the CAWU and Garda would have been equally entitled to cancel those hearings, for example, in the event of a settlement or withdrawal), the question of who should bear the cost consequences of the cancellation is not a matter of labour law. While the Board may have opinions on the subject, it has no authority or jurisdiction to make the order sought by the CAWU.

[22] Accordingly, the CAWU's request must be denied.

[23] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

William G. McMurray
Vice-Chairperson

Louise Fecteau
Vice-Chairperson